

1 J. Gordon Rudd
David M. Cialkowski
2 Anne T. Regan (*Pro Hac Vice*)
ZIMMERMAN REED, P.L.L.P.
3 651 Nicollet Mall, Suite 501
Minneapolis, MN 55402
4 Tel: (612) 341-0400
Fax: (612) 341-0844
5 Email: jgr@zimmreed.com
Email: dmc@zimmreed.com
6 Email: atr@zimmreed.com

7 **ATTORNEYS FOR PLAINTIFFS**

8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF ARIZONA**

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11 MARGARET GIBSON, JOE SHIP,
SOLOMON RACHMIN AND DON
12 OLSEN on behalf of themselves and all
13 others similarly
situated,
14 Plaintiffs,
15 vs.
16 FEDEX GROUND PACKAGE
SYSTEM, INC.,
17 Defendants.
18 -----

CASE NO. 07-933 (SRB)

**AMENDED CLASS
ACTION COMPLAINT**

19 Plaintiffs, on behalf of themselves and a Class of persons similarly situated, for
20 their Complaint against Defendant, state and allege as follows:

21 **PARTIES**

22 1. Plaintiffs are Margaret Gibson, Joe Ship, Solomon Rachmin and Don
23 Olsen. Plaintiffs Margaret Gibson, Solomon Rachmin and Don Olsen previously
24 worked for Defendant and were classified as independent contractors. Plaintiff Joe Ship
25 currently works for Defendant and is classified as an independent contractor.

26 2. Defendant FedEx Ground Package System, Inc. ("FEG"), and its division,
27 FedEx Home Delivery ("FHD") (hereinafter together referred to as "Defendant" or
28 "Defendant"), is a Delaware corporation doing business as two national companies,

1 affiliated with the Federal Express Corporation. At all relevant times, and within six
2 years of the filing of this Complaint, Defendant was engaged in providing small package
3 information, transportation and delivery services in the United States, including in the
4 State of Arizona.

5 3. Defendant is qualified to, and does, transact business in the State of
6 Arizona, including locations in Maricopa County.

7 4. Defendant employs local package delivery drivers for FEG and FHD, all of
8 whom, at FEG's and FHD's direction and control, perform package delivery to local
9 businesses and residences.

10 **JURISDICTION AND VENUE**

11 5. This is an action alleging illegal deductions from wages in violation of
12 Ariz. Rev. Stat. 23-352, fraud, and rescission.

13 6. Venue herein is proper because Defendant transacts business in this district.

14 **CLASS ACTION ALLEGATIONS**

15 7. This action is brought on behalf of a Class of persons currently and
16 formerly employed by Defendant as employees within the definition of "employee" in
17 the common and statutory law, but who, similar to the named Plaintiffs, are or were
18 erroneously Classified as "contractors" or "independent contractors." Occupations or jobs
19 in which Class Members worked or work include route delivery drivers for FEG and
20 FHD. The Class includes all such persons employed by Defendant within the statutes of
21 limitations. The Class is specifically defined as follows:

22 All persons who: 1) entered or will enter into a FXG Ground or FXG Home
23 Delivery form Operating Agreement (now known as form OP-149 and
24 form OP-149 RES); 2) drove or will drive a vehicle on a full-time basis
25 (meaning exclusive of time off for commonly excused employment
absences) since May 7, 2001, to provide package pick-up and delivery
services pursuant to the Operating Agreement; and 3) were dispatched out
of a terminal in the state of Arizona.

26 Plaintiffs believe that the Class as defined above includes over 500 members.

27 8. FEG and FHD employ thousands of drivers to pick up and deliver packages
28 for its customers throughout the United States. As a condition of employment, each FEG

1 and FHD driver is required to sign a lengthy form contract entitled the "Pick-up And
2 Delivery Contractor Operating Agreement" that mischaracterizes each driver as an
3 "independent contractor." These Operating Agreements conceal the true nature of the
4 relationship between Defendant and its drivers: that of employer and employee.

5 9. Plaintiffs, and Plaintiff Class Members, were denied the accoutrements of
6 employment, including, but not limited to:

- 7 a. wages;
- 8 b. overtime pay;
- 9 c. holiday pay;
- 10 d. workers' compensation;
- 11 e. unemployment insurance;
- 12 f. contributions to Defendant's retirement plan;
- 13 g. participation in Defendant's Employee Stock Purchase Plan;
- 14 h. income tax withholding; and,
- 15 i. meal, break and rest periods.

16 10. Plaintiffs, and Plaintiff Class Members, were required to pay Defendant's
17 operating expenses, all of which should have been paid by Defendant, including, but not
18 limited to:

- 19 a. delivery vehicle purchase;
- 20 b. various insurances, including vehicle insurance and work accident
21 insurance;
- 22 c. delivery vehicle maintenance and repairs;
- 23 d. purchase and maintenance of logos and uniforms;
- 24 e. fuel;
- 25 f. cargo claims; and,
- 26 g. "business support," including maps, signs, logos, training and
27 scanners.

28 11. Despite Defendant's control over virtually all material aspects of the
employment relationship, and despite the unequivocal command of applicable statutes

1 and case law to the effect that workers such as Plaintiffs are entitled to the protections
2 due employees under Minnesota law, and despite the finding of the Los Angeles
3 Superior Court in Estrada v. FedEx Ground Package Systems, Inc. (Case # BC 210130)
4 that these drivers are employees, Defendant continues to misclassify its drivers as
5 independent contractors. As a result, these drivers are deprived of the rights and
6 protections guaranteed by Minnesota law to employees, and they are deprived of
7 employer-financed workers compensation coverage and unemployment insurance
8 benefits. Furthermore, the terms and conditions of their employment contract require
9 these drivers to purchase, operate and maintain expensive trucks for Defendant's
10 exclusive benefit and to work under other unlawful conditions. Defendant's
11 mischaracterization of its drivers as independent contractors, the concealment and/or
12 non-disclosure of the true nature of the relationship between Defendant and its drivers
13 and the attendant deprivation of substantial rights and benefits of employment are part of
14 an on-going unlawful and fraudulent business practice by Defendant which this court
15 should enjoin.

16 12. The named Plaintiffs are adequate representatives of the Class because they
17 were treated in the same manner as other Class Members by the Defendant and they have
18 been damaged by this treatment in the same manner as other Class Members by their
19 exclusion from employee compensation programs, plans and agreements and employee
20 benefit plans and rights.

21 13. There are common questions of law and fact applicable to the entire Class
22 including, but not limited to, the question whether Plaintiffs and Plaintiff Class Members
23 are entitled to certain types of employee compensation and benefits because they are
24 employees of Defendant as defined by common and statutory law, even though
25 Defendant has misrepresented to Plaintiffs and Plaintiff Class Members their true
26 employment status.

27 14. This case should be certified as a Class action pursuant to Rule 23 of the
28 Federal Rules of Civil Procedure because the common questions of law and fact

1 concerning Defendant's liability predominate over any individual question over the
2 amount of damages to each person and that:

- 3 a. The members of the Class are so numerous that their
4 individual joinder in a single action is impossible and/or
5 impracticable;
- 6 b. The central questions of law and fact involved in this action
7 are of a common or general interest and those common legal
8 and factual issues predominate over any questions affecting
9 only individual members of the Class. Among the common
10 questions of law and fact are the following:
 - 11 i. Whether Class Members have been misclassified as
12 independent contractors pursuant to Defendant's operating
13 agreements;
 - 14 ii. Whether the Defendant has violated their legal obligations
15 under various provisions of Minnesota law;
 - 16 iii. Whether Defendant unlawfully failed to provide workers
17 compensation insurance benefits and unemployment
18 insurance benefits to the Class Members in violation of
19 Minnesota Law;
 - 20 iv. Whether Defendant intentionally and/or negligently
21 misrepresented to Plaintiffs and the Class they seek to
22 represent their true employment status and thereby induced
23 them to incur substantial expenses in reliance on such
24 representations and;
 - 25 v. Whether injunctive and declaratory relief and an equitable
26 accounting are proper.

19 15. The claims of the named Plaintiffs are identical to the claims of other
20 members of the Class. The named Plaintiffs share the same interests as other members
21 of the Class in this action because, like other Class Members, they have each been
22 misclassified and suffered financial loss of thousands of dollars due to Defendant's
23 wrongful misclassification. Given the significance of their losses, they have the
24 incentive, and are committed, to vigorously prosecuting this action. They have retained
25 competent and experienced counsel who specialize in Class action and employment
26 litigation to represent them and the proposed Class;

27 16. A Class action is the only realistic method available for the fair and
28 efficient adjudication of this controversy. The expense and burden of individual

1 litigation makes it impracticable for members of the Class to seek redress individually
2 for the wrongful conduct alleged herein. Were each individual member required to bring
3 a separate lawsuit, the resulting multiplicity of proceedings would cause undue hardship
4 and expense for the litigants and the Court and create the risk of inconsistent rulings
5 which would be contrary to the interest of justice and equity.

6 **FACTS COMMON TO ALL CAUSES OF ACTION**

7 17. Defendant is a corporation whose business consists of package delivery
8 and pick-up service to customers, using a single integrated nationwide network of
9 transportation, communication and sorting facilities and integrating Class Members into
10 that existing network of operations. Defendant hired Plaintiffs to deliver and pick up
11 packages based on times, locations and for amounts determined solely by Defendant.

12 18. Defendant employs or employed during the Class period more than 500
13 delivery and pick-up drivers in the State of Arizona including, either currently or at
14 material times in the past, each of the Plaintiffs.

15 19. Each pick-up and delivery driver (referred to by Defendant as a (“P&D
16 contractor”) must sign a “Pick-Up and Delivery Contractor Operating Agreement” and
17 Addenda thereto (referred to hereinafter as combined as “OA” or the “Operating
18 Agreement”) as a mandatory condition of employment. The date, time and place of
19 execution of each driver’s Operating Agreement is within the knowledge of Defendant as
20 each Agreement is maintained in the driver files described above, in the regular course of
21 business. The Operating Agreement between each member of the Plaintiff Class and
22 Defendant is the same in all material respects. The Operating Agreement between
23 Plaintiffs and FEG and between Plaintiffs and FHD contain all of the same identical
24 material terms with only a few, minor and insubstantial differences.

25 20. The Operating Agreement contains various statements purporting to
26 Classify Plaintiffs and Plaintiff Class Members as independent contractors. At the same
27 time, the Operating Agreement retains to the company, *inter alia*, the right to approve or
28 disapprove any vehicle used to provide service, the right to approve or disapprove any

1 driver or helper who provides service, the right to approve or disapprove the purchase or
2 sale of any vehicle, the right to assign pickup and delivery stops to each driver, the right
3 to temporarily or permanently transfer portions of any route to another with or without
4 compensation, the right to determine when a driver has “too few” or “too many”
5 packages to deliver on a given day, the right to inspect vehicles and drivers for
6 compliance with Company-promulgated appearance standards, the right to terminate the
7 contract upon thirty days notice or whenever the company unilaterally determines that
8 any provision of the contract has been “violated” amounting to the right to terminate at
9 will, the right to require the use of communication equipment and the wearing of
10 Company uniforms, the right to take a vehicle out of service, the right to review and
11 evaluate “customer service” and to set and change standards of such service, the right to
12 require drivers to perform service at “times” requested by customers and determined by
13 Defendant, the right to withhold pay for certain specified expenses, the right to require
14 purchase of specified insurance and numerous other purchases by drivers, the right to
15 require completion of specified paperwork, and other rights reserved to Defendant.

16 21. The Operating Agreement is and at all relevant times has been a contract of
17 adhesion, drafted exclusively by Defendant and/or its legal counsel, with no negotiation
18 with drivers, who are required to sign the Agreement as a condition of employment.
19 Plaintiffs and Plaintiff Class Members are required to sign the form contract as is,
20 without any changes made to the terms contained therein. Each year, drivers are
21 required to sign additional Addenda which are likewise not subject to negotiation and are
22 unilaterally drafted adhesion contract provisions. The Agreement is, and at all material
23 times has been unlawful, unconscionable and fraudulent in form and effect.

24 22. Defendant also has created and regularly updated a large number of written
25 policies and procedures outside of the Operating Agreement that drivers are never given,
26 but nonetheless are required to follow in their work. Defendant's written policies are
27 contained in the FedEx Ground Manual, Operations Management Handbook, Settlement
28 Manual and numerous other written and extra-contractual policies that are actively

1 concealed from drivers and which Defendant fails to disclose and/or provide to drivers
2 that govern the relationship between Defendant and the drivers. The other written
3 handbooks and manuals and additional extra-contractual sources include, but are not
4 limited, to written rules on “contractor” termination, directives and training provided to
5 terminal managers, written rules on driver appearance (with illustrative poster), written
6 and oral complaint procedures, memorandum and directives to terminal management and
7 other rules concealed from and not provided to the drivers. When drivers do not follow
8 an FEG or FHD rule, whether disclosed or undisclosed, known or unknown, they are
9 subject to various types of punishment, some financial and some disciplinary, up to and
10 including contract termination and/or non-renewal. Defendant documents such so-called
11 violations of such rules on forms referred to as “Business Discussion Notes” and retain
12 these documents in secret driver files called “DOT” files, along with myriad other
13 documents which are likewise concealed from and not disclosed to the drivers.

14 23. Defendant maintains compensation and benefit plans, agreements and
15 programs available to persons who are “employees” of Defendant. The benefit plans
16 include: Health Benefit Plan, Life Insurance Plan, Short-term and Long-term Disability
17 Plans, Accidental Death & Dismemberment and Survivor Income Plan, Employee Stock
18 Purchase Plan, Business Travel Accident Plan, and Retirement and 401 (K) Savings
19 Plans. In addition, employees of Defendant receive additional compensation programs,
20 plans, rights, and benefits, including vacation, holidays, sick leave, other types of paid
21 leave, and stock purchase rights.

22 24. Plaintiffs and Plaintiff Class Members have been excluded from the
23 foregoing compensation plans and programs and benefit plans for all or a portion of their
24 employment at FedEx due to their misclassification as non employees.

25 25. Plaintiffs and Plaintiff Class Members have incurred expenses for
26 equipment, insurance and other expenses that Defendant requires them to purchase under
27 the contract.
28

1 **FIRST CAUSE OF ACTION**
2 **ILLEGAL DEDUCTIONS FROM WAGES IN VIOLATION**
3 **OF ARIZ. REV. STAT. 23-352**

4 26. Plaintiffs re-allege and incorporate by reference each and every allegation
5 set forth in the preceding paragraphs.

6 27. Defendant has withheld monies from the compensation earned by
7 Plaintiffs and Plaintiff Class Members for business expenses of Defendant, including but
8 not limited to vehicle expenses, cargo claims and insurance claims in violation of
9 Arizona Revised Statutes 23-352. Plaintiffs and Plaintiff Class Members have not
10 expressly and freely given written consent to such withholding or diversion, and these
11 deductions are not made in response to a valid wage assignment or deduction order.
12 Such withholding and diversion was not for the Plaintiff and Plaintiff Class Members'
13 employees' benefit.

14 28. Defendant has withheld said funds unlawfully without providing Plaintiffs
15 and Plaintiff Class Members with advance notice of the amounts, reasons or
16 documentation to justify such deductions, and absent any lawfully sufficient reason for
17 such conduct.

18 29. As a direct and proximate result of Defendant's conduct, Plaintiffs and
19 Plaintiff Class Members have suffered substantial losses and been deprived of
20 compensation to which they were entitled, including monetary damage in an amount of
21 two times the amounts deducted, pre-judgment interest, costs and reasonable attorney
22 fees.

23 **SECOND CAUSE OF ACTION:**
24 **RESCISSION**

25 30. Plaintiffs hereby incorporate by reference all preceding paragraphs as if
26 fully set forth herein, and further allege:
27
28

1 31. Despite the express terms of the Operating Agreement, Plaintiffs'
2 relationship with Defendant satisfies every aspect of the test for employment, and not for
3 independent contractor status.

4 32. Defendant controls virtually every aspect of the Plaintiffs' work and
5 earnings, as set forth in the general allegations hereof at paragraphs 17 through 25.

6 33. Despite this control and the actual status of the drivers as employees,
7 Defendant mischaracterizes the Plaintiffs as independent contractors. As a result, these
8 drivers must pay substantial sums of their own money for work-related expenses,
9 including but not limited to the purchase or lease of vehicles meeting company
10 specifications, and all costs of operating, insuring and maintaining those vehicles.

11 34. The Operating Agreement illegally and unfairly advantages Defendant, by
12 mischaracterizing the status of the Plaintiffs in that Defendant evades employment
13 related obligations, such as social security contributions, workers' compensation
14 coverage, and state disability and unemployment compensation, illegally shifting the
15 expense of workers' compensation coverage and other expenses to Plaintiffs.

16 35. The Operating Agreement between Defendant and each Plaintiff and
17 member of the Class is void as against public policy and therefore unenforceable, as
18 failing to recognize the employment status of the Plaintiffs and the Class Members, and
19 therefore denying them the legally cognizable benefits of employment.

20 36. The Operating Agreement between Defendant and each Plaintiff is an
21 unconscionable contract of adhesion, which is unenforceable as contrary to the public
22 interest, policy and law.

23 37. The Operating Agreement illegally shifts the burden of certain costs that an
24 employer must pay.

25 38. While acting on the direct instruction of Defendant and discharging their
26 duties for Defendant, Plaintiffs and the Class Members incurred expenses for, *inter alia*,
27 the purchase or lease, maintenance, operating costs and adornment of vehicles;
28

1 insurance; and uniforms. Plaintiffs and the Class Members incurred these substantial
2 expenses as a direct result of performing their job duties.

3 39. By misclassifying its employees as “independent contractors,” and further
4 by contractually requiring those employees to pay Defendant’s own expenses, Defendant
5 has been unjustly enriched.

6 40. As a direct and proximate result of Defendant’s conduct, Defendant has
7 received substantial benefits to which it had no entitlement, at Plaintiffs and the Class
8 Members’ expense, including lost profits, self-employment taxes, premiums for
9 insurance to replace workers compensation and disability benefits, business expenses,
10 compensation of replacement workers, and other expenses.

11 41. Plaintiffs are entitled to compensation for all of the business expenses they
12 were illegally required by Defendant to bear, for all of the employment taxes,
13 unemployment compensation and workers compensation the Defendant should have but
14 did not pay, and Plaintiffs are entitled to the *quantum meruit* value of their services as
15 employees.

16 **THIRD CAUSE OF ACTION:**
17 **DECLARATORY RELIEF**

18 42. Plaintiffs hereby incorporate by reference all preceding paragraphs as if
19 fully set forth herein, and further allege:

20 43. An actual controversy has arisen between the Plaintiffs and Plaintiff Class
21 Members, on the one hand, and Defendant, on the other hand, relating to the following
22 matters:

- 23 a. Whether Defendant has unlawfully misclassified Plaintiffs and
24 Plaintiff Class Members as independent contractors, and have
25 thus denied Plaintiffs and Plaintiff Class Members of the
26 common benefits of employee status, such as
27 i. wages;
28 ii. holiday pay;
iii. workers’ compensation;
iv. unemployment insurance;

1 v. contributions to Defendant's retirement plan;

2
3 vi. income tax withholding;

4 vii. meal, break and rest periods.

5 b. Whether Defendant has unlawfully failed to pay benefits and
6 compensation owing in a timely manner to Plaintiffs and
7 Plaintiff Class Members whose employment with Defendant
8 ended, as required by Minnesota law.

9 c. What amounts Plaintiffs and Plaintiff Class Members are entitled
10 to receive in compensation and benefits.

11 d. What amounts Plaintiffs and Plaintiff Class Members are entitled
12 to receive in interest on unpaid compensation due and owing.

13 e. What amounts Plaintiffs and Plaintiff Class Members are entitled
14 to receive from Defendant in statutory penalties and interest.

15 44. Plaintiffs and Plaintiff Class Members further seek entry of a declaratory
16 judgment in their favor which declares Defendant's practices as heretofore alleged to be
17 unlawful and which provides for recovery of all sums determined by this Court to be
18 owed by Defendant, and each of them, to the Plaintiffs and Plaintiff Class Members.

19 **FOURTH CAUSE OF ACTION**
20 **REQUEST FOR INJUNCTIVE RELIEF**

21 45. Plaintiffs hereby incorporate by reference all preceding paragraphs as if
22 fully set forth herein, and further allege:

23 46. Defendant will continue to misclassify Plaintiffs and Plaintiff Class
24 Members as independent contractors and unlawfully deny them the common benefits of
25 employee status;

26 47. Plaintiffs and Plaintiff Class Members have been injured and damaged, and
27 are threatened with injury and damage, by Defendant's continued misclassification and
28 unlawful refusal to pay all compensation and benefits as heretofore alleged, and
29 Plaintiffs and Plaintiff Class Members have no adequate remedy at law.

30 48. Defendant has acted, and threatened to act, on grounds generally applicable
31 to the individual members of the Class, thereby making appropriate preliminary and

1 permanent injunctive relief enjoining Defendant and their agents from practicing the
2 unlawful practices heretofore alleged.

3 **WHEREFORE**, Plaintiffs request that judgment be entered against Defendant for
4 the following:

5 1. Declaring that the Defendant's acts described in this Complaint constitute
6 violations of Ariz. Rev. Stat. 23-352 and Arizona common law;

7 2. An award of benefits due them under the programs, agreements and plans
8 described above with an appropriate award of interest;

9 3. An award of damages for their erroneous exclusion from the programs,
10 agreements and plans described above with an appropriate award of interest;

11 4. Clarification and enforcement of their rights under these programs,
12 agreements and plans;

13 5. An award of damages for all out-of-pocket expenses incurred by Plaintiffs
14 and Plaintiff Class Members necessary to perform their jobs for Defendant described
15 above with an appropriate award of interest;

16 6. Rescinding the Operating Agreement, and awarding restitution
17 compensating for the reasonable value of the benefit provided to Defendant;

18 7. Attorney fees and costs as provided by law; and,

19 8. Such other further relief as the Court may deem just and equitable.

20 Dated: May 15, 2007

Respectfully submitted,

ZIMMERMAN REED, P.L.L.P.

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23 s/ Anne T. Regan
J. Gordon Rudd
David M. Cialkowski
Anne T. Regan (*Pro Hac Vice*)
651 Nicollet Mall, Suite 501
Minneapolis, MN 55402
Tel: (612) 341-0400
Fax: (612) 341-0844
Email: jgr@zimmreed.com
Email: dmc@zimmreed.com
Email: atr@zimmreed.com

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25
26
27
28 **ATTORNEYS FOR PLAINTIFFS**

1 Of Counsel:

2 ZIMMERMAN REED, P.L.L.P.
3 Hart L. Robinovitch, AZ Bar No. 020910
4 14646 No. Kierland Blvd, Suite 145
5 Scottsdale, Arizona 85254
6 Tel: (480) 348-6400
7 Fax: (480) 348-6415
8 Email: hlr@zimmreed.com

6 LOCKRIDGE GRINDAL NAUEN P.L.L.P.
7 Susan E. Ellingstad
8 100 Washington Avenue South, Suite 2200
9 Minneapolis, MN 55401
10 Tel: (612) 339-6900
11 Fax: (612) 339-0981
12 Email: seellingstad@locklaw.com

10 HALUNEN & ASSOCIATES
11 Clayton D. Halunen
12 Joni M. Thome
13 220 South Sixth Street, Suite 2000
14 Minneapolis, MN 55402
15 Tel: (612) 605-4098
16 Fax: (612) 605-4099
17 Email: halunen@halunenlaw.com
18 Email: thome@halunenlaw.com

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